INDEX

	Page
Opinions Below	1
Jurisdiction	1
Question Presented	2
Statute Involved	2
Statement:	
(a) Nature of the proceeding below	2
(b) The proceedings before the Commission	3
(c) Necessity for equitable relief to safeguard the public interest and the interests of the investors	7
Specification of Errors	13
Summary of Argument	13
Argument:	
I. The Commission's complaint falls within the purview of traditional equity jurisdiction	15
II. The District Court had jurisdiction as a federal court	43
III. The Commission has standing to sue for equitable relief to aid the public investors and protect the Commission's processes	45
Conclusion	58

CITATIONS

Cases:	
American Power & Light Company v. *S. E. C.*, No. 470, this Term	46
Associated Industries v. *Ickes*, 134 F. 2d 694, dismissed as moot, 320 U. S. 707	46
Babbitt v. *Dutcher*, 216 U. S. 102	33
Board of Railroad Commissioners v. *Great Northern Railway*, 281 U. S. 412	39, 40
Byllesby, H. M., & Co., 6 S. E. C. 630	38
Cities Service Company, 8 S. E. C. 318	38
Continental Illinois N. B. & T. Co. v. *Chicago, R. I. & P. Ry. Co.*, 294 U. S. 648	33
Debs, In re, 158 U. S. 564	51
Electric Bond and Share Company v. *Securities and Exchange Commission*, 303 U. S. 419	20, 45
Endicott-Johnson Corp. v. *Perkins*, 317 U. S. 501	18
Federal Power Commission v. *Metropolitan Edison Company*, 304 U. S. 375	18, 43
Grasselli Chemical Co. v. *Aetna Explosives Co.*, 252 Fed. 482	33
Hecht Co. v. *Bowles*, 321 U. S. 321	37, 53

639666—45——1

Cases—Continued. Page

Hottenstein v. *York Ice Machinery Co.*, 136 F. 2d 944 28
Jones v. *Securities and Exchange Commission*, 298 U. S. 1 31
Merrimack River Savings Bank v. *Clay Center*, 219 U. S. 527 17–18
Myers v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41 18
Niagara Hudson Power Corporation, et al., Holding Company Act Release No. 5115 4
North American Company, 9 S. E. C. 617 41
Northern Pacific Ry v. *Soderberg*, 86 Fed. 49 34
North Shore Gas Co., 10 S. E. C. 504 32
Olive Land & Development Co. v. *Olmstead*, 103 Fed. 568 34
Otis & Co. v. *Securities and Exchange Commission*, No. 81, this Term 28
P. & W. Va. Ry. Co. v. *United States*, 281 U. S. 479 49
Price v. *Spokane Silver & Lead Co.*, 97 F. 2d 237 32
Rochester Gas & Electric Co. v. *Malbie*, 284 N. Y. 626 27
Rochester Telephone Corp. v. *United States*, 307 U. S. 125 46
Scripps-Howard Radio, Inc. v. *Federal Communications Commission*, 316 U. S. 4 52
Securities and Exchange Commission v. *Collier & Co.*, 76 F. 2d 939 44
Securities and Exchange Commission v. *Joiner Leasing Corp.*, 320 U. S. 344 36
S. E. C. v. *Okin*, No. 815, this Term 46
Securities and Exchange Commission v. *United States Realty & Improvement Company*, 310 U. S. 434 16, 47, 48, 50
Singer & Sons v. *Union Pacific R. Co.*, 311 U. S. 295 46
Spruni & Son v. *United States*, 281 U. S. 249 49
Standard Oil Company of New Jersey, Holding Company Act Release No. 3312 38
Stark v. *Wickard*, 321 U. S. 288 45
Underground Electric Rys. Co. v. *Owsley*, 176 Fed. 20 33–34
United States v. *Morgan*, 307 U. S. 183 52
United States v. *Parrott*, Fed. Cas. No. 15998 34
Wartman v. *Wartman*, Fed. Cas. No. 17210 34
Wood v. *Braston*, 54 Fed. 1005 34

Statutes:

Judicial Code, Sec. 24 14, 44
Public Utility Holding Company Act of 1935 (Act of August 26, 1935, c. 687, 49 Stat. 803, 15 U. S. C. Sec. 79 *et seq.*):
Sec. 1 (c) 4, 36, 55
Sec. 2 (a) (3) 19
Sec. 2 (a) (4) 19
Sec. 2 (a) (7) 19, 55
Sec. 2 (a) (8) 19
Sec. 3 (a) 4, 6, 19, 21, 57
Sec. 3 (c) 20, 59
Sec. 6 (a) 25

Statutes—Continued.
Public Utility Holding Company Act of 1935—Continued. Page
Sec. 7 (e) 25
Sec. 7 (f) 25
Sec. 11 (b) 5, 25, 26
Sec. 11 (d) 5, 25
Sec. 11 (e) 5
Sec. 12 (c) 25
Sec. 18 (f) 15, 35, 36, 60
Sec. 20 (a) 40, 60
Sec. 20 (c) 40
Sec. 24 (b) 42
Sec. 25 15, 35, 60
Sec. 29 36
New York Public Service Law:
Sec. 22 7
Miscellaneous:
Dodd, *Fair and Equitable Recapitalizations* (1942), 55 Harv. L. Rev. 780 29
Dodd, *The Relative Rights of Preferred and Common Shareholders in Recapitalization Plans Under the Holding Company Act* (1944), 57 Harv. L. Rev. 295 29
H. Rep. No. 1318, 74th Cong., 1st sess., p. 11 22
Latty, *Fairness—The Focal Point in Preferred Stock Arrearage Elimination* (1942), 29 Va. L. Rev. 1 29
Report of the S. E. C. to Congress, May 1938 27
Securities and Exchange Commission Report on the Study and Investigation of the Work, Activities, Personnel and Functions of Protective and Reorganization Committees, Part VII (Management Plans Without Aid of Committees) 24
S. Rep. No. 621, 74th Cong., 1st sess. 22, 26

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 1059

SECURITIES AND EXCHANGE COMMISSION, PETITIONER

v.

LONG ISLAND LIGHTING COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION

OPINIONS BELOW

The opinions of the Circuit Court of Appeals (R. 16–32) are not yet reported. The opinion of the District Court (R. 8–13) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 14, 1945 (R. 43). The petition for a writ of certiorari was filed March 19, 1945, and was granted March 26, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of

the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Pending administrative proceedings instituted by the Commission, after a complaint by preferred stockholders, to determine whether a recapitalization plan, challenged as contrary to the fair-and-equitable and public-interest standards of the Holding Company Act, should be subjected to those standards (*inter alia*, through revocation of an expressly revocable exemption order), the Company involved undertook to consummate the plan. The question presented is whether a federal district court has jurisdiction to issue an injunction so that the purpose of the administrative proceeding will not be frustrated by a *fait accompli*, and if so, whether the Commission has standing to invoke such jurisdiction.

STATUTE INVOLVED

The pertinent statutory provisions are set forth in the Appendix, *infra*, pp. 55 *et seq.*

STATEMENT

(a) *Nature of the Proceeding Below*

This action was instituted by the Securities and Exchange Commission to enjoin respondent, Long Island Lighting Company, from completing efforts to consummate a plan of recapitalization under New York state law, pending determination

by the Commission in an administrative proceeding of the question whether the rights of stockholders sought to be affected by such plan should be subject to the reorganization standards of Section 11 of the Public Utility Holding Company Act of 1935 (Act of August 26, 1935, c. 687, 49 Stat. 803, 15 U. S. C. § 79 *et seq.*). Upon the allegations of the complaint, the Commission applied for a temporary injunction, which the district court, after hearing and argument, denied for lack of jurisdiction. The court below affirmed, one judge dissenting.

(b) *The Proceedings before the Commission*

The facts, which are not in dispute, may be summarized as follows:

Long Island, a holding company as defined in Section 2 (a) (7) of the Act, was exempted from the registration and regulatory provisions of the Act by order of the Commission dated March 27, 1936 (R. 2). That order was expressly subject to revocation in the event the Commission should find, after opportunity for hearing, that the circumstances which gave rise to its issuance no longer exist. (R. 2.)

On November 4, 1944, a committee purporting to represent the holders of some $1,300,000 par value of Long Island's preferred stock petitioned the Commission to reopen the exemption proceedings, stating that since the issuance of the 1936 exemption order dividend arrears in excess of

$10,000,000 had accumulated on the preferred stock, and that the Company was endeavoring to carry out a plan of recapitalization unfair to the preferred stockholders, subject only to such authorization as was necessary under state law from the Public Service Commission of the State of New York (R. 2).

On November 10, 1944, the Commission instituted administrative proceedings to determine whether Long Island's exemption should be revoked in whole or in part. The broad question raised was whether, as a result of changed circumstances, including the accumulation of preferred dividend arrears and the company's allegedly unfair plan, the Commission should find it "detrimental to the public interest or the interests of investors or consumers" to leave in force an exemption from any provision or provisions of the Act.[1] (R. 2–3, pars. 3–4.) Other important sub-

[1] Section 3 (a) of the Act and Section 1 (c) circumscribe the exemption which may be granted to holding companies, although predominantly intrastate, to the extent that the Commission finds the exemption detrimental to the public interest or the interest of investors or consumers by reason of activities in interstate commerce or directly affecting or burdening interstate commerce. Appellee's activities in these respects are in issue in the proceedings pending before the Commission. *Cf.*, e. g., *Niagara Hudson Power Corporation, et al.*, Holding Company Act Release No. 5115, where the Commission, upon a finding that a holding company offending the provisions of Section 11 (b) (2) was engaged in interstate commerce and in activities directly affecting or burdening interstate commerce, denied the

sidiary questions of public interest were whether the security structure of Long Island and the distribution of voting power are such as to require changes to conform to the corporate simplification standards of Section 11 (b) (2) of the Act;[2] whether the pending plan of recapitalization is so offensive to the "fair and equitable" standard of Section 11 as to require that it be subject to the safeguards provided in that Section; and whether the plan is so inadequate as to leave the Company in need of further reorganization to meet the standards of Section 11 (b) (2).[3] The proceeding

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holding company an exemption from the provisions of Section 11 (b) (2) without deciding whether the specific requirements of Section 3 (a), in respect of the predominantly intrastate nature of its business, were met.

[2] Section 11 (b) (2) of the Act imposes upon the Commission the duty to require that each registered holding company, and each subsidiary thereof:

"* * * shall take such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company in the holding-company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of such holding-company system."

[3] Section 11 (d) of the Act empowers the Commission to apply to a district court to enforce compliance with orders issued pursuant to Section 11 (b) and contemplates, among other methods of enforcement, effectuation of a "fair and equitable reorganization plan which shall have been approved by the Commission after opportunity for hearing." Section 11 (e) provides that a company subject to such provisions may submit to the Commission a voluntary plan of compliance, which must be "fair and equitable to the

639066—45——2

was broadened by orders dated November 21 and 22, 1944, whereby the Commission first instituted, and then consolidated with the pending proceeding, a separate proceeding under Section 2 (a) (7) (B) of the Act to determine whether certain persons and corporations owning or controlling substantial amounts of Long Island's outstanding common stock exercise such a controlling influence over its management or policies as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that they, or any one or more of them, be subject to the obligations, duties and liabilities imposed by the Act upon holding companies.[4] (R. 2–3.) A determination by the Commission adverse to any of the respondents in either branch of the consolidated proceeding would subject Long Island and its plan of recapitalization to the jurisdiction, scrutiny, and approval of the Commission and the federal courts under the applicable standards of the Act either as a holding company, or as a subsidiary of a holding company, required to register under the Act.

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persons affected by such plan" before it can be approved by the Commission; and the company may request the Commission to apply to a district court to enforce the plan which the Commission has approved.

[4] Two of the respondents in these proceedings were Delaware corporations and therefore presumably not entitled to exemption under Section 3 (a) (1) if found to be holding companies with respect to Long Island, a New York corporation.

The hearing in the consolidated proceeding was ordered to convene on December 19, 1944 (R. 3, par. 5). On the preceding day, December 18, 1944, the Commission learned through the public press that Long Island was undertaking to consummate the plan under New York state law without awaiting a determination whether the plan should be subjected to scrutiny under the Holding Company Act. Long Island had not advised the Commission that the New York Public Service Commission had acted favorably on the plan and that the Company was proceeding immediately to consummate the plan. The New York Commission, by order dated December 14, 1944, had allowed Long Island thirty days to consummate the plan and would doubtless have allowed additional time.[8]

(c) *Necessity for equitable relief to safeguard the public interest and the interests of the investors*

The record does not describe the plan in detail. The complaint states that it is a plan of recapitalization affecting the relative rights of more than 10,000 public investors in many states (R.

[8] The preferred stockholders' brief, *amicus curiae*, submitted in the court below, pointed out that the preferred stockholders, as objectors, had thirty days to petition for rehearing and request the New York Commission to modify or set aside its order under Section 22 of the New York Public Service Law.

3–4, 5; pars. 7, 12).[6] The complaint alleged (R. 4):

> There is serious doubt whether the said plan of recapitalization of the Long Island Lighting Company is fair and equitable to the persons affected thereby, and whether if it were presented to the Commission it would be found to meet the standards of the Act prescribed by Congress for the protection of investors. It is also doubtful, because of the unsatisfactory capitalization structure of the company, if the said plan were put into effect, that the plan could be found by the Commission to be in the public interest and for the interests of investors or consumers.[7]

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[6] The brevity of the complaint is attributable in part to the necessity for instituting the action below within less than 24 hours after the Commission learned of the company's actions. Since the district court's decision rested exclusively on jurisdictional grounds there was no necessity or occasion for enlarging on the brief allegations in the complaint. In our brief in the court below we submitted the following summary of the terms of the plan and no question was raised by Long Island as to the adequacy of this summary:

"Under the plan preferred stockholders are to surrender 40% of all their contractual rights, including their preferential claim to current dividends, and liquidation and redemption rights, except that dividends on the preferred stocks accumulated and unpaid since 1938, aggregating some $10,000,000, will remain unpaid and will continue to represent a prior claim to available income *vis-a-vis* the new common stock proposed to be issued. 50.38% of such new common stock will be distributed to preferred stockholders in exchange for the rights which they are to surrender."

[7] In paragraph 11 of the complaint the Commission further alleged (R. 4–5):

"In the event the above described proceedings pursuant to Section 3 (a) or 2 (a) (7) (B) of the Act were to result

The Commission, as a litigant, in order to avoid prejudging an issue which might come before it in its quasi judicial capacity, limited itself to alleging its "serious doubt" as to the fairness and adequacy of the plan under Holding Company Act standards. Its instructions to its counsel to file the complaint for injunction represented, as the dissenting judge below observed, the Commission's conclusion that the action of the company sought to be enjoined was sufficiently likely to prejudice the interests which the Commission has a statutory obligation to protect to warrant seeking equitable relief to preserve the status quo.

The New York State Public Service Commission, which had fully considered the plan of recapitalization, had condemned it as unfair both in the colloquial sense and in the light of its understanding of Holding Company Act standards, although declaring itself lacking in power to rectify the situation under state law. The plan had been the subject of proceedings before the New York Commission since February, 1944. In an interim opinion dated July 27, 1944, that Commission indicated that in numerous respects

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in subjecting Long Island Lighting Company to the provisions of Section 11 of the Act, it is probable that a reorganization of the company on a fair and equitable basis, substantially at variance with the terms and conditions of the present plan, and with due regard to the public interest and the interest of investors and consumers, would be ordered by the Commission pursuant to Section 11 (b) (2) of the Act."

the plan dealt unfairly with the interests of preferred stockholders, and stated, among other things (R. 3–4):

> It is quite apparent that the common stockholders do not intend that the management and control of the company shall pass out of their hands, regardless of the equities of the situation. But if they sincerely believe that the plan will actually deprive the interests which have controlled the company of their control in the future, what objection do they have to giving all stockholders voting rights in proportion of their claims against the company?
>
> The power of the Commission to remedy this condition directly is nil. The Security and Exchange Commission has dealt rather summarily with such conditions in companies under their jurisdiction, but we have no power to compel a company to readjust its stocks or voting rights in accord with what is considered sound finance and equitable considerations. We can only approve or disapprove, pointing out the facts and the regards in which any proposal fails to deal justly and wisely with the interests affected. Counsel for the company argues that they have "made a sacrifice" because they could have sold their stock prior to the stockholders' meeting of April 25, 1944 for at least eleven-sixteenths dollar per share and received $8.25 for 12 shares (brief p. 11), whereas under the proposed plan each holder of 12 shares is

to receive only $5.00 stated value in new common stock. The extent to which the common stockholders could properly claim the offer is magnanimous and is a sacrificial offering may be open to debate. Having received in recent years four times the stated value of their common stock which would have been more than sufficient to pay all arrearages on the preferred stock, it hardly behooves them to assert their great virtue. If they had had as much consideration for the preferred stockholders as they purport to have now, the company could have avoided the non-payment of preferred dividends for six years.

On December 14 the New York Commission issued an order authorizing the plan after certain minor modifications. Two of the five members of that Commission declined to vote on the entry of the order for the stated reason that proceedings under the Holding Company Act with respect to Long Island were pending before the Securities and Exchange Commission and were at a crucial stage (R. 4, par. 8).

Although the Securities and Exchange Commission assumed that the company's action in filing the charter amendment with the Secretary of State of New York had effectuated, so far as state law is concerned, the change of security holders' rights contemplated by the plan, it believed that there was still time to prevent an alteration of their rights beyond the possibility

of rectifying the situation under the "fair and equitable" standard of the Holding Company Act. No steps had been taken to make physical changes in the outstanding securities of the company to reflect the changes in rights under the plan. Accordingly, the further action by way of consummation which the Commission sought to enjoin included the distribution of new common shares, in lesser amounts, to existing common stockholders, the overprinting of the preferred stockholders' existing certificates to represent the reduction of their preferential rights, and the issuance of new common shares to the preferred stockholders. The complaint alleged that (R. 5):

> The taking of the further steps to consummate the plan as described in the preceding paragraph will tend to induce trading in securities on the basis of said plan being an accomplished fact without disclosure of the fact that proceedings under the Act may require a radically different plan and may require determination of the fairness and equity of any new plan with reference to the relative rights of security holders as they existed prior to the consummation of the present plan. The result will be confusion to security holders as well as substantial difficulties in the discharge by the Commission and the federal courts of their duties with respect to the effectuation of fair and equitable plans of reorganization to comply with Section 11 (b) of the Act.

The Commission's position was and is that as a governmental agency it has standing to invoke the injunctive aid of a federal court of equity to preserve a status quo in order to prevent its statutory processes from proving nugatory and investors from having their rights altered through precipitous action of a holding company management in contravention of the purposes of the Act. While resting primarily upon general equitable power, we deem this position in no way inconsistent with, if not expressly implemented by, the enforcement provisions of the Act.

SPECIFICATION OF ERRORS

1. The court below erred in holding that the Commission's complaint did not set forth a valid claim for equitable relief.

2. The court below erred in holding that a federal court has no jurisdiction in equity or under the provisions of the Holding Company Act to entertain the Commission's complaint.

3. The court below erred in holding that the Commission lacked standing to sue for equitable relief to prevent Long Island from frustrating the investor safeguards of the Act by consummating its plan of recapitalization pending the Commission's administrative proceeding.

SUMMARY OF ARGUMENT

The Commission's complaint for injunctive relief sought to prevent Long Island from frus-

trating the investor safeguards of the Act by consummating its plan of recapitalization pending administrative proceedings. Jurisdiction of a federal court to aid the Commission in enforcing this right by a restraining order flows from the traditional equity power granted a federal court by Section 24 of the Judicial Code which includes ancillary relief in support of a proceeding in another tribunal. In denying the sufficiency of the Commission's complaint, the court below rested on a distinction between the protection of an existing and of a hypothetical jurisdiction. This reasoning fails to take account of the nature and importance of the existing jurisdiction which the Commission was seeking to protect. The purpose of the Act was to protect public investors from typical corporate abuses in the holding company field, including unfair plans of recapitalization; the Commission was given responsibility to secure investor protection from such abuses; the structure and legislative history of the exemption and revocation provisions of the Act specifically authorize the Commission to consider abuses of this kind, including changed conditions, in determining whether the public interest requires revocation of an exemption; and on the facts of this case the Commission's ability to perform its public functions of protecting Long Island's investors depends on its right to prevent Long Island from disturbing the status quo.

Further power may be drawn from the provision of Section 25 of the Act, giving federal courts jurisdiction of suits in equity to enforce any "liability or duty created by" the Act. The restrictive canons of statutory construction relied on by the court below to preclude the Commission from any relief not based upon the charge of a literal "violation" of the Act or a rule or order issued thereunder (Section 18 (f)), are inapplicable in view of the purpose of the Act to "meet the problems and eliminate the evils" which Congress had perceived.

The Commission's standing to sue for such relief in a federal court is supported by decisions of this Court which uphold the right of an administrative agency to invoke judicial aid to protect the public functions of the agency and which broadly indicate the need for a harmonious interplay of functions between courts and administrative agencies in safeguarding the public interest.

ARGUMENT

I

The Commission's complaint falls within the purview of traditional equity jurisdiction

The issues presented are: (1) whether the Commission's complaint sets forth an equitable claim of the character which falls within the purview of traditional equity jurisdiction; (2) whether

under the Judicial Code and the Holding Company Act the federal courts have jurisdiction to enforce such an equitable claim; and (3) whether the Commission has standing to invoke that jurisdiction in its own name. These issues are interrelated and were so treated by the court below. While the court decided that the Commission lacked standing to sue and that the federal courts lacked jurisdiction to grant the relief sought, it was not suggested by the court, or urged by Long Island, that any one other than the Commission was the proper party to sue or that relief should have been sought in a state rather than a federal court.

Thus the ultimate issue is whether it is appropriate under general equitable principles, and consistent with the provisions of the Act, that the status quo be preserved pending a determination in the administrative proceeding; the arguments that the Commission lacks standing to sue for such relief and that a federal court lacks jurisdiction to grant it are predicated on a construction of the Act precluding such relief. As we show below, this involves an unduly restrictive construction of the Act, as well as a misinterpretation of this Court's opinion in *Securities and Exchange Commission* v. *United States Realty & Improvement Company*, 310 U. S. 434.

Moreover, and apart from this consideration, the majority opinion below reflects a confusion

between the existence of jurisdiction in the Commission and the application of particular regulatory provisions of the Act contingent upon the exercise of the Commission's jurisdiction to grant and revoke exemptions. Although the company had itself invoked the jurisdiction of the Commission to obtain a revocable exemption under the Act,[18] and the Commission was in fact exercising an unquestioned jurisdiction to determine whether that exemption should be revoked, the court below regarded the case as one in which protection was sought for "a jurisdiction not presently existing, merely because upon speculative and problematical circumstances, such jurisdiction may at some uncertain time in the future, arise." The court accordingly put to one side decisions which sustain the right of a federal court of equity to preserve a status quo by injunction "to protect a jurisdiction otherwise acquired."

Courts will, of course, issue injunctions to preserve the status quo pending a judicial determination, notwithstanding an undetermined issue as to the court's jurisdiction over person or subject matter. In *Merrimack River Savings Bank* v. *Clay*

[18] Had Long Island ignored the Act, its efforts to recapitalize would have posed an issue of violation of Section 4 within the letter of Section 18 (f). Cf. *Electric Bond and Share Company* v. *Securities and Exchange Commission*, 303 U. S. 419. In such a suit there would be no question about jurisdiction to grant interlocutory relief.

Center, 219 U. S. 527, 534, this Court held that a lower court, even though determining that there was a lack of federal jurisdiction over the cause, may properly continue in effect, pending appeal, a temporary injunction previously granted. To fail to accord more modest protection to an administrative agency would seem to stem from regarding it as "an alien intruder", contrary to admonitions of this Court. More specifically, this Court has recognized the propriety of protecting the exercise of administrative authority pending an administrative determination of jurisdictional questions. Thus, in *Myers* v. *Bethlehem Shipbuilding Corp.,* 303 U. S. 41, and *Federal Power Commission* v. *Metropolitan Edison Company,* 304 U. S. 375, this Court held that a federal administrative proceeding in which the ultimate regulatory authority of the Commission was to be determined was entitled to immunity from injunctive restraint which would have adjudicated *in limine* the jurisdictional issue. In *Endicott-Johnson Corp.* v. *Perkins,* 317 U. S. 501, it was held that an administrative proceeding under which the question of regulatory jurisdiction was likewise to be determined is entitled to the assistance of the subpoena power. In the light of these cases, we submit that the court below erred in holding that the Commission's jurisdiction here involved was too hypothetical to be entitled to the protection of the courts.

To demonstrate that the Commission did have an unquestioned jurisdiction which it was exercising, as the dissenting judge maintained, to the full extent presently applicable (R. 31), and that protection of such jurisdiction is essential to the performance of the Commission's statutory functions, we turn to an examination of the exemption provisions of the statute.

The Holding Company Act deals only with holding companies whose subsidiaries operate in the electric and gas utility fields. Long Island is such a holding company. (See the definitions in Sections 2 (a) (3), (4), (7) and (8).) In the absence of exemption, Long Island would be required to register under Sections 4 and 5 of the Act, and would be subject to the regulatory provisions applicable to registered holding companies, including those relating to its security structure and to plans for recapitalization thereof. Section 3 (a), however, provides that: "The Commission, by rules and regulations upon its own motion, or by order upon application, shall exempt any holding company, and every subsidiary company thereof as such, from any provision or provisions of this title, *unless and except insofar as it finds the exemption detrimental to the public interest or the interest of investors or consumers,* if"—the holding company meets the conditions specified in one of five numbered categories. (Italics supplied.) The categories under which

exemption may be granted relate in general to the holding company's being (1) predominantly intrastate in character, (2) predominantly a public-utility company, (3) primarily in the non-public utility field, (4) temporarily a holding company, or (5) without material utility interests within the United States. The exemption granted to Long Island was based on a Commission finding that it satisfied the qualifications of the first of these categories, and that it did not then appear that exemption should be denied or limited under the "unless and except" clause. Under Section 3 (c), "the filing of an application in good faith under subsection (a)" exempts the applicant "until the Commission has acted upon such application." Section 3 (c) also provides that the Commission, *inter alia,* on its own motion shall revoke an exemption whenever it "finds that the circumstances which gave rise to the issuance of such order no longer exist."

When Long Island initially applied for exemption from registration and regulation under the Act, Section 3 (c) gave it the benefit of a temporary exemption pending Commission action on the application,[*] conditioned, however, on the

[*] The temporary exemption afforded by Section 3 (c) is a matter of not inconsiderable practical significance since literally hundreds of exemption applications were filed in the period immediately following the passage of the Act and immediately following the decision of this Court in *Electric Bond and Share Company* v. *Securities and Exchange Commission*, 303 U. S. 419.

application being made in "good faith," and when thereafter the Commission proceeded under Section 3 (a) to consider whether to issue an order granting Long Island's application, the Commission was specifically empowered by Section 3 (a) to deny or limit this exemption "in so far as it finds the exemption detrimental to the public interest or the interest of investors or consumers."* Finally, under Section 3 (c), and the express terms of the order in question, the exemption granted could later be revoked by further order of the Commission upon a finding "that the circumstances which gave rise to the issuance of such order no longer exist."

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*In its findings and opinion accompanying its order of March 27, 1936, the Commission thus described its power:

"Section 3 (c) provides that the Commission shall revoke such order whenever it shall find that the circumstances which gave rise to its issuance no longer exist. The provisions of Section 1 (c) and 3 (c) are also sufficient to authorize the Commission to modify or amend its order if it shall find that the exemption is detrimental to the public interest, or that of investors or consumers, by reason of any activities of the applicant or of any such subsidiary company in interstate commerce, or directly affecting or burdening interstate commerce. Of course, no such revocation or modification of the order can be made without first giving the parties in interest due notice and opportunity for hearing (1 S. E. C. 345, 346 (1936))." (R. 2.)

Legal problems which might arise out of the Commission's administrative proceeding are, of course, not relevant here. No order has been entered in that proceeding, and if an order were issued revoking Long Island's exemption such legal problems would be relevant in a judicial proceeding to review that order.

639686—45——4

The legislative history of the Act shows clearly that both the public-interest qualification to exemption, and the change-of-circumstances standard applicable to revocation proceedings, were intended by Congress as means to prevent abuse and circumvention by companies enjoying an exemption. The House and Senate Committee reports expressly state that the exemptions provided in the Act were considered broad "beyond what would be justified if the exemptions had been made unqualified and self-operative." What "justified" the exemption provisions as they stood was deemed to be the revocation provision of Section 3 (c) which the Committees construed to be a power "to correct [an exemption order] when abused or used to circumvent the purposes of the title."[10] And since denial of any exemption, or denial of exemption from particular provisions of the Act, could have been predicated initially upon detriment to the interest of the public and of investors, rather than upon failure

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[10] S. Rep. No. 621, 74th Cong., 1st sess., p. 24; H. Rep. No. 1318, 74th Cong., 1st sess., p. 11.

The Commission has not considered that the effectuation of this Congressional policy requires surveillance of the activities of the hundreds of holding companies and subsidiaries which, like Long Island, have been exempted without qualification from the regulatory provisions of the Act, including those requiring reports. Instead, as this case indicates, the Commission will investigate and act in those situations where facts brought to the Commission's attention disclose a need for corrective action.

to satisfy the rule-of-thumb conditions specified in the five numbered clauses of Section 3 (a), it seems plain that the circumvention and abuse which might require revocation were as likely to spring from new circumstances related to the public interest as from a change in these specified conditions. The power of revocation thus granted for the declared purpose of preventing an exemption from being misused to circumvent the statutory purposes, is the power which the Commission was undertaking to exercise in its administrative proceeding. The broad question presented was whether, in view of Long Island's security structure, the alleged unfairness and inadequacy of its proposed plan and the widespread distribution of its securities, further continuation of the exemption would be "detrimental to the public interest or the interest of investors"—or whether there should be revocation of the exemption, at least to the extent necessary to permit the Commission to require a fair, equitable and adequate plan for elimination of inequitable distribution of voting power and the existing complexities of Long Island's financial structure. This public interest question was interrelated with the question whether the circumstances which gave rise to the original unrestricted exemption had changed in view of the default in the payment of preferred dividends and the accumulation of over $10,000,000 of

arrears subsequent to the exemption order, and Long Island's attempt to carry out a recapitalization plan of doubtful fairness.

In what ways did these preferred dividend arrearages and the questionable recapitalization plan suggest possible abuses of the investor safeguards provided by the Act?

In the first place, the $10,000,000 of dividend arrearages on Long Island's preferred stock accumulated between 1938 and 1944 reflected an unhealthy financial condition and management practice.[11] This the New York Public Service Commission has sharply criticized with the statement that:

> Having received in recent years four times the stated value of their common stock which would have been more than sufficient to pay all arrearages on the preferred stock, it hardly behooves them [the common stockholders] to assert their great virtue. If they had had as much consideration for the preferred stockholders as they purport to have now, the company could have avoided the non-payment of preferred dividends for six years.

What was thus indicated was the kind of condition and practice that the regulatory provisions

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[11] See Securities and Exchange Commission Report on the Study and Investigation of the Work, Activities, Personnel and Functions of Protective and Reorganization Committees, Part VII (Management Plans Without Aid of Committees), especially pp. 109–197.

of the Holding Company Act were expressly intended to deal with."[12]

Secondly, plans of recapitalization under lax or ineffective state laws offered by holding company managements as devices to "cure" capital impairments and remove blocks to the payment of dividends out of current earnings, were specifically considered by Congress and intended to be replaced by "fair and equitable" plans supervised, and, if need be, compelled by the Commission.

Thus, the reports of the House and Senate committees stated that the reason why Section 6 (a) (2) gave the Commission regulatory power over the alteration of "priorities, preferences, voting power or other rights" of the security holders of registered holding companies and their subsidiaries (practices of considerable relevancy to typical recapitalization plans) was that:

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[12] Section 7 (c) forbids the issuance of any preferred stock by a registered holding company, except subject to such terms and conditions as the Commission may deem necessary or appropriate in the public interest and for the protection of investors (Sec. 7 (c), (d), (e) and (f)). Section 12 (c) forbids a registered holding company to pay any dividends in contravention of Commission rules or orders designed to protect its financial integrity and curb the payment of dividends out of capital or unearned surplus. Finally, where excessive preferred dividend arrearages and other unsound financial conditions in a registered holding company have resulted in an unfair and inequitable distribution of voting power among its security holders, Sections 11 (b) (2) and 11 (d) empower the Commission to compel a reorganization of the Company to correct the inequity.

> * * * [this] provision is designed to protect the investor where the charter of the company under the lax provisions of the corporate laws of some of the States affords him no protection against the confiscation of his rights.[19]

Furthermore, the Report of the National Power Policy Committee, appended to the Report of the Senate Committee (S. Rep. No. 621, 74th Cong., 1st sess., at p. 58), recommended that while the owners of holding company securities should have every opportunity to work out their own plans of reorganization—

> That opportunity should, of course, be vigilantly guarded to protect the average investor from the exploitation threatening him almost as a matter of course under our usual methods and mores of corporate reorganization. In destroying the abuses of the holding companies, the Government must not leave great groups of helpless investors to the certain abuses of extensive hurried corporate reorganizations. The dominant groups who have ruthlessly plucked the investor in promoting some

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[19] S. Rep. No. 621, 74th Cong., 1st sess., at p. 26. With regard to the companion provisions of Section 7 (f) the Report stated (p. 28) that these provisions were "designed to give adequate protection to investors and consumers * * * and are in accord with the *underlying purpose of the legislation* to give to investors and consumers full protection against the deleterious practices which have characterized certain holding-company finance in the past." [Italics supplied.]

of these huge holding companies must not be allowed to pluck him again as reorganization managers.

Without prejudging Long Island's plan, it may be stated that the situation could all too easily have involved the typical management practice of using an absence of current dividends and a large amount of arrearages as devices to coerce public preferred stockholders into surrendering a large part of their due, in terms of assets, earnings and voting power, in return for the consent of common stockholders to the appropriation of current earnings for dividend purposes.[14]

Under state law, as the New York Commission candidly observed, the regulatory agency had—

> * * * no power to compel a company to readjust its stocks or voting rights in accord with what is considered sound finance and equitable considerations. We can only approve or disapprove, pointing out the facts and the regards in which any proposal fails to deal justly and wisely with the interests affected.

While the court below observed that the New York Commission had the duty to withhold approval unless it found that the plan was in the interest of investors (citing *Rochester Gas & Electric Co.* v. *Maltbie,* 284 N. Y. 626), this was,

[14] That the criticisms leveled at Long Island's plan by the New York Commission are typical in this regard, see the Report of the S. E. C. cited *supra*, fn. 11, p. 24.

as that Commission frankly conceded, a mere negative power to protect investor interests. When the preferred stockholders voted for the plan, they were confronted with only the Hobson's choice either to accept the management proposals or to wait indefinitely for the resumption of dividends. The State Commission was confronted with a similar choice either to approve a plan which it regarded as unfair or to leave the preferred stockholders in their existing dividendless condition. In this context, the State Commission's power to determine whether the plan was in the interest of investors was far less adequate to protect the preferred stockholders than the Securities and Exchange Commission's statutory power to *compel* such changes in the capital structure of a holding company as may be necessary or appropriate to effectuate the "fair and equitable" and "public interest" standards of the Act.[18]

When the preferred stockholders, by their complaint, directed the Commission's attention to

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[18] See *Hottenstein* v. *York Ice Machinery Co.*, 136 F. 2d 944 (C. C. A. 3, 1943), indicating that under typical state law a preferred stockholder may have equitable relief against an unfair plan only upon a showing that the plan is so grossly unfair as to "amount to constructive fraud".

Cf. *Otis & Co.* v. *Securities and Exchange Commission*, No. 81, this Term. While this Court divided, as did the Commission, on the question whether the Commission had followed a proper method of determining what is "fair and equitable", in a liquidation of a solvent holding company,

Long Island's need for recapitalization, to the plan and to the State Commission's criticism thereof, the issue which they raised involved the applicability of one of the most important investor safeguards provided by the Act. In instituting the revocation proceedings, the Commission's notice and order for hearing emphasized the company's efforts to consummate the allegedly unfair plan as an important public interest consideration to be weighed in determining whether or not to revoke. Unless the Commission had power to preserve the status quo pending determination of this issue, its unquestioned jurisdiction to consider whether or not the exemption should be revoked [16] would prove meaningless.

Although the Commission assumed that Long Island had already taken all steps necessary under

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there can be little dispute that the result of the application of this standard by the Commission and the courts has been to give preferred stockholders far better protection than is available under state law. This has been the conclusion of disinterested commentators. See Latty, *Fairness—The Focal Point in Preferred Stock Arrearage Elimination* (1942), 29 Va. L. Rev. 1, 27–39; Dodd, *Fair and Equitable Recapitalizations* (1942), 55 Harv. L. Rev. 780, 796–806, 816; Dodd, *The Relative Rights of Preferred and Common Shareholders in Recapitalization Plans Under the Holding Company Act* (1944), 57 Harv. L. Rev. 295.

[16] If the exemption were to be revoked in whole or in part, the Commission could thus make Section 11 applicable and proceed from that point to compel such changes in the security structure of Long Island as would be required to meet the "fair and equitable" and other standards of that section

the New York State Incorporation Law to effectuate the change in stockholders' rights contemplated by the plan, the plan was not yet a *fait accompli*. The same security instruments continued to evidence the entire "bundle of rights" of the existing preferred and common stockholders of Long Island, making it possible to restore the status quo in the event of a revocation of the exemption by the Commission and a finding that fairness and equity required the Commission to use the relative rights of stockholders antecedent to the plan as the basis for determining the equitable equivalent of their rights in any new plan which might be promulgated under the fair-and-equitable standard of Section 11. In the application of that standard the Commission might well conclude that the proper basis for evaluating the relative rights of Long Island's preferred and common stockholders in a new plan would be their respective rights as they existed at the time the Commission instituted the revocation proceedings, rather than those rights as precipitously altered pending the administrative determination. Even in a case which did not involve the fair and equitable standard this Court has suggested that an administrative proceeding for revocation of a license, not dissimilar to the proceeding here involved, is sufficiently analogous to a bill in equity for an injunction to make applicable the equitable

doctrine of *lis pendens*. See *Jones* v. *Securities and Exchange Commission*, 298 U. S. 1, 15–18. That case involved the issuance of a stop order to suspend, after hearing, a securities registration. Prior to hearing thereon the Court held that the situation was like a bill for an injunction in that "even though a temporary injunction be not granted, he acts at his peril and subject to the power of the court to restore the status, wholly irrespective of the merits as they may be ultimately decided."

But the ability of the Commission to find that it would be fair and equitable to ignore Long Island's effectuation of the changes provided in the plan, or that it would be feasible to do so without hardship to innocent security holders, was dependent on preventing intervening equities from arising. This meant prevention of trading in the new securities without actual knowledge of the issues involved in the Commission's proceeding. If the physical changes in Long Island securities, which would reflect rights as altered by the plan, should be made, it would be the natural expectation of investors upon receiving the new securities that the financial structure of the company as altered by the plan would continue unchanged—at least until change was made necessary by new financial conditions not foreseen. It would undoubtedly prove startling to many of them to learn

that the reorganization might be followed almost immediately by a new reorganization,[17] and still more startling to learn that the old security structure rather than the rights as altered by the plan could be the basis for the new structure. Trading in the new common stock would cause intervening equities in the purchasers to arise, and both buyers and sellers would be faced with the serious question whether the new common stock could or would in a later reorganization be separated so as to permit fair treatment to all security holders. For this reason, preferred and common stockholders alike would be subjected to the risk—gratuitously created by Long Island—that their respective rights might as a practical matter have to be readjusted in a later reorganization under the Act on a basis which would necessarily involve some element of hardship or inequity to at least some of the investors affected.

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[17] The feasibility standard of Section 77B and of Chapter X reflects an expectation that reorganization should not be a recurrent phenomenon in corporate affairs. As was said in *Price* v. *Spokane Silver & Lead Co.*, 97 F. 2d 237, 247 (C. C. A. 8, 1938):

"* * * it was not the intention of Congress in enacting § 77B to place crutches under corporate cripples, fit subjects for liquidation, and send them out into the business world to be a menace to all who might purchase their securities or deal with them on credit."

The Commission has held that the standards of the Holding Company Act reflect similar considerations. See *North Shore Gas Co.*, 10 S. E. C. 504, 521.

We submit, therefore, that the relief which the Commission was seeking was appropriate to prevent thwarting the duties of the Commission, to the public injury, and hence appropriate for consideration of a court of equity. In seeking to preserve the status quo pending hearing, the Commission was invoking one of the most ancient and traditional aspects of equity jurisdiction. The Commission was relying upon well-settled precedents upholding the inherent power of a court of equity to preserve a status quo pending proceedings before it or another tribunal. See *Babbitt* v. *Dutcher*, 216 U. S. 102; *Continental Illinois N. B. & T. Co.* v. *Chicago, R. I. & P. Ry. Co.*, 294 U. S. 648, 675–676; *Graselli Chemical Co.* v. *Aetna Explosives Co.*, 252 Fed. 456 (C. C. A. 2, 1918). As this Court observed in the *Babbitt* case (pp. 110–111), in upholding the ancillary jurisdiction of federal courts in bankruptcy cases prior to the statute which expressly gave them that authority, the power does not depend upon the existence of specific authority, but is "the necessary result of the general jurisdiction conferred upon them, and is in harmony with the scope and design of the act. * * * a uniform system of bankruptcy, national in its character, ought to be capable of execution in the federal tribunals." For other illustrations of the exercise of ancillary equitable jurisdiction to preserve the status quo pending determination of rights in another tribunal, judicial or administrative, see *Un-*

derground Electric Rys. Co. v. *Owsley,* 176 Fed. 26 (C. C. A. 2, 1909) (appointment of a receiver to preserve the status of New York property of a decedent estate in probate proceedings before an Illinois state court); *United States* v. *Parrott,* Fed. Cas. No. 15998. See also *Olive Land & Development Co.* v. *Olmstead,* 103 Fed. 568 (C. C. S. D. Cal.); *Northern Pacific Ry.* v. *Soderberg,* 86 Fed. 49 (C. C. D. Wash.) (injunctions to prevent waste pending an administrative determination of title); *Wood* v. *Braxton,* 54 Fed. 1005 (C. C. D. W. Va.). Indeed, the Commission was merely asking the court to exert the traditional jurisdiction that Taney, C. J., employed in *Wartman* v. *Wartman,* Fed. Cas. No. 17210, where he held in contempt a litigant who sought by his acts to render moot, before an injunction could issue, the proceeding then pending before the court.

Two specific objections which the court below addressed to the existence of inherent federal equity jurisdiction in this type of case remain to be considered. In the first place, it held that the specific statutory remedies for certain types of cases under the Act negated any equitable jurisdiction for other cases. Secondly, it was the view of the court that the failure of the Commission to issue an administrative order taking jurisdiction over Long Island constituted a defect comparable to the failure to exhaust administrative remedies and precluded a court from taking jurisdiction upon the Commission's complaint.

The first difficulty which the court below found springs from the fact that Section 18 (f) of the Act gives a federal court jurisdiction at the suit of the Commission to enjoin only a "violation" of the Act or of a rule or order issued thereunder. Since the Commission made no charge that Long Island's attempt to frustrate the purpose of the administrative proceeding constituted in any literal sense a violation of the Act or of the Commission's rules or orders,[18] it was the court's view that this express grant of authority to seek the aid of the federal courts necessarily excluded injunctive relief upon grounds otherwise appropriate as a matter of general equitable principles. This argument gives no effect whatever to Section 25 of the Act, which provides, *inter alia,* that the federal courts shall have jurisdiction of suits in equity to enforce any "liability or duty created by" the Act. As the dissenting judge suggested, Section 25 and Section 18 (f) "chart the course" of federal jurisdiction to grant the relief sought by the Commission, although, of course, it is necessary to look to general

[18] A charge of "violation" would have raised the question of willfulness and the consequent applicability of criminal penalties provided by Section 29. While Long Island might be deemed to have "violated" the Commission's order for hearing by its precipitous action, the Commission did not wish to raise this question of criminality with respect to an interlocutory order and in advance of any administrative determination on the merits.

equity principles for the equitable duty, the violation of which makes Sections 25 and 18 (f) applicable. Whether or not it is concluded from these principles that Sections 25 and 18 (f) give the Commission a specific statutory right to the relief sought, we submit that these provisions afford no basis for any assumption that Congress intended to exclude the Commission from obtaining such relief. For that reason our principal argument here, as in the court below, is that the relief sought is one which falls within the general jurisdiction of the federal courts as courts of equity.

To apply here, as did the court below, the maxim *expressio unius, exclusio alterius,* together with substantive tax law distinctions between "avoidance" and "evasion", ignores the fact that the Commission's purpose in seeking equitable relief was to prevent precipitous action from circumventing the substantive policy of the statute and likewise rejects the congressional intention that this remedial legislation be liberally construed (Sec. 1 (c)). As this Court held in *Securities and Exchange Commission* v. *Joiner Leasing Corp.*, 320 U. S. 344, 350, such an intention on the part of Congress clearly outweighs restrictive canons of statutory construction.

As further support for the argument that the particular form of circumvention here involved must have been intended by Congress to be beyond

the power of the Commission to correct, the court below suggested that it would be a negation of the grant of exemption for the company to be subject to the possibility of any restraint whatsoever prior to an effective revocation, saying, "it may also be said that an overriding authority to revoke at any time leaves an exempt corporation completely helpless, if in times of financial stress it becomes necessary to reform its capital structure" (R. 23). The court referred to the peril that "the Commission, upon the petition of any disgruntled stockholder or group of stockholders, may, by a proceeding such as this, invoke the strong arm of a court of equity between plan and its consummation without regard to the exigency nor to the effort and expense that may have been expended in formulation." This argument assumes an abuse of sound discretion both by the Commission in seeking, and an equity court in granting, injunctive relief. *Cf. Hecht Co.* v. *Bowles,* 321 U. S. 321.[19] The fact is that the Com-

[19] The assumption as to the probability of abuse of discretion by the Commission may perhaps be attributable to a misapprehension by the court below of the facts in the instant case. The majority opinion refers without warrant in the record to Long Island as "finding itself in a critical situation in respect to the maturity of its securities * * *" (R. 22). In fact, the contrary was shown affirmatively, after decision; the company's first mortgage debt was refunded in 1942 and does not mature until 1972, and its only other funded indebtedness consists of debentures which do not mature until May 1, 1956 (R. 37).

mission has not attempted to exercise any continuing surveillance over exempt companies and, even where it has had occasion to deny exemption, has frequently postponed the effective date of its orders in order to facilitate a rearrangement of corporate affairs free of complications under the Act where this would not prejudice the public or private interests which it is the duty of the Commission to protect.[20] Indeed, the very possibility of resort to equitable remedies to prevent unforeseen abuse of the exemption before formal revocation proceedings can be completed, makes possible a more liberal exercise of the Commission's exemptive powers than would otherwise be possible. If the holding of the court below should be affirmed, it may well be the duty of the Commission, without awaiting specific threat of abuse, to hedge exemptions with restrictions which would preclude any possible abuse that can be foreseen. Inflexible interpretation of the administrative and enforcement provisions of the Act would seem to be as undesirable from the point of view of holding companies who may be entitled to some exemption, as from the point of view of the public and investor interests sought to be protected by the Act, making it necessary to burden companies

[20] See *H. M. Byllesby & Co.*, 6 S. E. C. 639, 658–660 (1940); *Cities Service Company*, 8 S. E. C. 318, 338 (1940); *Standard Oil Company of New Jersey*, Holding Company Act Release No. 3312 (1942).

which do not seek to abuse the grant of exemption with restrictions designed to reach the less scrupulous.

The second objection of the court below—that the Commission was premature in its application for judicial aid—is actually a broader statement of the objection already considered. The court relied on *Board of Railroad Commissioners* v. *Great Northern Railway*, 281 U. S. 412, in which this Court held that a federal court has no jurisdiction at the suit of a railway to enjoin intrastate rates, as reduced by order of a state commission, pending proceedings before the Interstate Commerce Commission to determine the validity of the rates. That case differs markedly from this. That case rested largely on the traditional reluctance of the federal courts, confirmed by the pattern of the Interstate Commerce Act, to interfere with the power of a state to fix intrastate rates. The order of the state commission in that case was mandatory, whereas in the present case the decision of the New York Commission was purely permissive and arose on the voluntary application of respondent for a license to carry out its plan. Approval of the plan by the state commission did not compel its precipitous execution, and, as the dissenting judge below suggested (R. 27), the action of the New York commission was "almost a direct invitation or appeal to the Securities and Exchange Commission to afford the relief the state agency

cannot." Moreover, in the *Great Northern Railway* case, the Interstate Commerce Commission was not itself seeking to protect its jurisdiction; indeed, an outstanding order of that Commission provided that the intrastate rates in force should "continue in force and effect until revoked, modified or superseded by appropriate lawful proceedings before said board [the state commission]" or "as otherwise provided by law." 281 U. S. 417.

Apart from the novelty of interposing the doctrine of exhaustion of administrative remedies as a barrier to protection sought by the agency itself, there is a question, left unresolved by the court, whether any adequate administrative remedy existed. As the Commission pointed out in its brief in the court below, it did not overlook the possibility of itself issuing a summary order under the residual power conferred upon it by Section 20 (a) of the Act to issue such orders as may be deemed "necessary or appropriate to carry out the provisions of this title." Section 20 (c) provides that orders under the Act "shall be issued only after opportunity for hearing," and while we should regard an abbreviated opportunity appropriate to a summary order designed only to preserve the *status quo*, it is not so clear that the Commission would be authorized to issue, without any opportunity for hearing at all, the equivalent of an *ex parte*

temporary restraining order. Under the circumstances of the present case, it was necessary to obtain an immediate restraint and, therefore, only an *ex parte* restraining order would suffice. As to the necessity for a preliminary administrative determination before seeking judicial relief, there could be no difference between the issuance of an *ex parte* order, followed by the bringing of a suit to enjoin violation of that order, and the determination of the Commission to seek equitable relief, followed by instructions to its counsel to proceed accordingly. The dissenting judge expressed the opinion that the Commission had in fact acted to the full extent presently appropriate (R3[illegible]—), and the majority of the court below did not indicate that the Commission could have taken any further action without the hearing which the company's precipitous action had precluded.

While the Commission does regard issuance of its own *ex parte* order followed by a suit to enjoin any threatened violation of that order as a possible alternative to the procedure which it pursued in this case,[n] it has seemed to it more

[n] Cf. *North American Company*, 9 S. E. C. 617 (1941), where the Commission, after a summary hearing and a finding that the proposal of a registered holding company to invoke state court dissolution proceedings was itself a violation, issued an order directing the company not to proceed with the plan and forthwith made application to a district court to enjoin threatened violations which included

consonant with traditional doctrines concerning division of powers to rely upon the courts rather than the administrative agency itself for such interlocutory relief, at least in the absence of a more specific indication of the intention of Congress than is found in Section 20. Issuance of such an order by the Commission would subject the company to the risk of criminal sanctions for violation. This circumstance might well have precipitated the case into a circuit court of appeals on a petition of the company for review, accompanied by an application for a stay of the order pursuant to Section 24 (b), which would have raised essentially the same issues of discretion as would be involved in the exercise of jurisdiction by the district court over the complaint filed by the Commission.

In addition, it seemed to the Commission more consonant with the respective functions of the circuit courts of appeals (which have jurisdiction only to review Commission orders), and the district courts (which have original equity jurisdiction at the suit of the Commission), to impose on the latter the burden of weighing equities incident to a determination of whether

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the threat of the company to violate the new administrative order. The company agreed to await the decision of the district court before proceeding with the plan, and the action was later dismissed pursuant to stipulation upon abandonment of the proposed dissolution.

the *status quo* should be maintained where on no theory of procedure would the circuit court of appeals have had before it an administrative order on the merits. Cf. *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U. S. 375.

If the Commission was wrong in assuming that it was inappropriate to issue its own interlocutory restraining order under the circumstances, nevertheless we submit that the dissenting judge was correct in concluding that the instructions to Commission counsel to bring a suit were the substantial equivalent of such an order, and at most, since respondent could not have been prejudiced by the omission, the court should have held the case to await a formal order. If, on the other hand, the Commission was right in concluding that no further administrative action was presently appropriate then it follows that the doctrine of exhaustion of administrative remedies could have no application.

II

The District Court had jurisdiction as a federal court

While both courts below denied that the District Court had jurisdiction as a federal court, it was not intimated that a state court would have any greater jurisdiction and we submit that once it is established that the complaint stated a proper cause for equitable jurisdiction it cannot be ques-

tioned that such equitable jurisdiction is properly cognizable in a federal court.

The Commission's complaint invoked the general equity powers of a federal district court which extend, under Section 24 (1) of the Judicial Code, to "all suits of a civil nature, at common law or in equity." Under that provision this case may be sustained as an action brought by the United States[22] or by an officer thereof authorized by law to sue," or as involving a federal question, or as a suit arising under a law

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[22] Although the court below rejected jurisdiction under Section 24, it did not intimate that the difficulties which it found with the Commission's case could be cured by a suit filed by the Department of Justice on behalf of the United States, or by the Commission in a state court, or by the preferred stockholders suing in a state or federal court. It is our view that the Act contemplates that the Attorney General shall have responsibilities for criminal proceedings and that civil suits are to be brought by the Commission. Cf. *Securities and Exchange Commission* v. *Collier & Co.*, 76 F. 2d 939 (C. C. A. 2, 1935). The dissenting judge below intimated that preferred stockholders might have had an independent standing to sue by analogy to the cases which have recognized private standing to sue for damages under other statutes administered by the Commission (R. 32). We deem it unnecessary to express any opinion on this point. Whether or not individual security holders can sue, it is clear that Congress looked primarily to the Commission as the enforcement agency for the protection of the interest of investors, and it can scarcely be doubted that if the preferred stockholders had attempted to obtain equitable relief, Long Island would have objected that the right of action, if any, was in the Commission.

[23] This was the view of the dissenting judge below.

regulating commerce.[24] The equitable precedents relied on to show that this is an appropriate case for the issuance of an injunction to preserve the status quo indicate as well that Long Island was under an equitable duty not to disturb the *status quo*. This duty, in turn, affords a basis for federal jurisdiction under Section 25 of the Act.

III

The Commission has standing to sue for equitable relief to aid the public investors and protect the Commission's processes

The related argument that the Commission lacks standing to sue in this case reflects, we submit, an over-narrow view of the relations between the judiciary and the administrative agencies of the federal government in the performance of their respective functions. If the Holding Company Act had not lodged in the Commission the primary responsibility for protecting the public interests but, instead, had left those interests to be protected at the suit of private parties, it could hardly be questioned that a court would have

[24] The Holding Company Act is, of course, a federal law regulating interstate commerce. *Electric Bond and Share Co.* v. *Securities and Exchange Commission*, 303 U. S. 419. See *Stark* v. *Wickard*, 321 U. S. 288, 290, n. 1, holding that a district court has implied power to consider a suit challenging administrative action under the Agricultural Marketing Agreement Act of 1937 in the absence of any express provision for judicial review of the order in question.

jurisdiction to preserve the status quo pending the outcome of proceedings before it to determine whether, as here, an exemption should be revoked. Indeed, even under the existing scheme of the Act, if the Commission should refuse to revoke Long Island's exemption and it should be held that the complaining preferred stockholders were "persons aggrieved" entitled to petition for review under Section 24 of the Act, it would seem clear that the reviewing court would have power to preserve the *status quo* pending the review proceeding."[25] And again, it may well be that even in the present situation Long Island's preferred stockholders would be entitled to equitable protection, including the issuance of a temporary restraining order, against the threatened hazards of Long Island's actions. The dissenting judge below intimated that they were entitled to such relief upon their own complaint (R. 32) "under the implications of the Act itself, just as has been held with re-

[25] See *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125. The problem of when an administrative agency should be regarded as the sole guardian of the public interest and related private interests is one to which the courts have given divers answers in the contexts of particular statutes. See *Singer & Sons* v. *Union Pacific R. Co.*, 311 U. S. 295; *Associated Industries* v. *Ickes*, 134 F. 2d 694 (C. C. A. 2), dismissed as moot, 320 U. S. 707. Cf. *American Power & Light Company* v. *S. E. C.*, No. 470, this Term; and *S. E. C.* v. *Okin*, No. 815, this Term. The Commission and the courts have never had occasion to consider whether security holders have standing to review an order granting or refusing to revoke an exemption from the provisions of the Act.

spect to other acts administered by the S. E. C."[28] The majority of the court below neither challenged nor indicated acquiescence in this view but denied that the Commission, even though charged with primary responsibility for protecting the interests of Long Island's preferred stockholders, had standing to seek this relief on their behalf.

A compelling precedent for the right of an administrative agency to seek judicial aid for the protection of its primary or more comprehensive jurisdiction is *S. E. C.* v. *United States Realty and Improvement Co.*, 310 U. S. 434. There, as in this case, this Commission was obliged to resort to a statutory procedure wherein it had no express standing in order to protect its jurisdiction under its own statute.

In the *Realty* case, the debtor, a corporation having liabilities in excess of $3,000,000 and many public security holders, undertook to reorganize under Chapter XI. The Commission sought to intervene, alleging that Chapter X prescribed the exclusive procedure for the reorganization of corporations having securities in the hands of the public. After comparing the procedures prescribed by Chapters X and XI, this Court held that the safeguards provided for public security holders by Chapter X could not be circumvented by the debtor's resort to Chapter XI. In so holding, Mr. Justice Stone said for this Court (310 U. S. at 458–459):

[28] See note 22, p. 44, *supra*.

The Commission is, as we have seen, charged with the performance of important public duties in every case brought under Chapter X, which will be thwarted, to the public injury, if a debtor may secure adjustment of his debts in a Chapter XI proceeding when, upon the applicable principles which we have discussed, he should be required to proceed, if at all, under Chapter X. The Commission's duty and its interest extend not only to the performance of its prescribed functions where a petition is filed under Chapter X, but to the prevention, so far as the rules of procedure permit, of interferences with their performance through improper resort to a Chapter XI proceeding in violation of the public policy of the Act which it is the duty of the court to safeguard by relegating respondent to a Chapter X proceeding. The Commission did not here intervene to perform the advisory functions required of it by Chapter X, but to object to an improper exercise of the court's jurisdiction which, if permitted to continue, contrary to the court's own equitable duty in the premises, would defeat the public interests which the Commission was designated to represent.

The court below sought to distinguish the *Realty* case on the ground that the Chapter XI court had, by virtue of the pendency of the proceeding, exclusive jurisdiction of the debtor and

its property, which could be exercised through dismissal of the proceedings, and permitting the Commission to intervene as a party was merely an appropriate method of exercising that jurisdiction, adding that the right to intervene does not imply a right to bring an original suit." But the

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" The court cited, in this connection, *Sprunt & Son* v. *United States*, 281 U. S. 249, 255; *P. & W. Va. Ry. Co.* v. *United States*, 281 U. S. 479, both of which turn upon special statutory provisions, not on Rule 24 of the Rules of Civil Procedure which was the basis for intervention in the *Realty* case. On this point the dissenting judge stated (R. 30, n. 8):

"It is believed that nothing in Rule 24 supports such a distinction. True, intervention will not require new grounds of federal jurisdiction—an issue which must be faced on an original suit; and injury justifying intervention may more clearly appear when litigation is already under way than where suit is being instituted against *threatened* harm. This is brought out by one of the cases cited in the opinion, *Pittsburgh & W. Va. Ry.* v. *United States*, 281 U. S. 479, 486, as follows: 'The mere fact that appellant was permitted to intervene before the Commission does not entitled it to institute an independent suit to set aside the Commission's order *in the absence of resulting actual or threatened legal injury to it*.' [Italics added.] So the reference in the *U. S. Realty* case to the fact that no personal or pecuniary interest was required for the S. E. C.'s intervention, citing *Commonwealth of Pennsylvania* v. *Williams*, 294 U. S. 176, 96 A. L. R. 1166, where the Commonwealth was heard under similar conditions, is support for the general authority of the S. E. C. to act in vindication of a public interest, rather than expansion of a procedural rule beyond anything contemplated in its history. See *Commercial Cable Staffs' Ass'n* v. *Lehman*, 2 Cir., 107 F. 2d 917; 49 Yale L. J. 927, 934; Commentary, *Nature of Permissive Intervention under Rule 24b*, 3 Fed. Rules Serv. 704; Berger, *Intervention by Public Agencies in Private Litigation in the Federal Courts*, 50 Yale L. J. 65."

Realty case recognized the Commission's standing to sue and to appeal from an adverse order in the Chapter XI proceeding notwithstanding the fact that its only express interest was a statutory right to become a party to a Chapter X proceeding without right of appealing, while Chapter XI was wholly silent as to the status of the Commission.

It was because any order in the Chapter XI proceeding which would have enabled the debtor to adjust its obligations under that part of the Bankruptcy Act, would have conclusively impaired the exercise of the Commission's functions under Chapter X and would have had an equally conclusive effect on the public investors in the debtor who would have been deprived of the beneficial protection of Chapter X, that a remedy was sought and found in the broad legislative purpose of the two Chapters.[28]

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[28] In the *Realty* case the Circuit Court of Appeals for the Second Circuit (108 F. 2d 794), Judge Clark dissenting, made almost precisely the same argument against the Commission's standing there as was advanced by the majority of the court below here, saying (at p. 797):

"The Commission argues that in order to protect its right to intervene in a Chapter X proceeding it must be allowed to intervene in any Chapter XI proceeding which it believes ought properly to have been brought under Chapter X. But this proceeds upon the false premise that the Commission has a present right to protect. It has no such right. Its only right is to intervene *if* a Chapter X proceeding is pending. Until such a proceeding is instituted, the Commission has no interest whatever to protect." [Italics supplied.]

Among the cases cited by this Court in the *Realty* case, in support of the Commission's standing to seek judicial relief appropriate to the maintenance of its statutory authority and the performance of its public duties, was *In re Debs*, 158 U. S. 564—a case which the dissenting judge below characterized as "a still broader assertion of federal power and duty." In the *Debs* case this Court sustained the right of the Government to seek the aid of the federal courts, and the inherent equity power of the courts to give that aid, saying (at p. 584):

> Every government, entrusted, by the very terms of its being, with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other, and it is no sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter. The obligations which it is under to promote the interest of all, and to prevent the wrongdoing of one resulting in injury to the general welfare, is often of itself sufficient to give it a standing in court.

The use of judicial powers to safeguard public interests which are entrusted to the guardianship of an administrative agency is consonant with recent decisions of this Court marking the growth of the federal administrative agencies as instruments for the more effective performance

of executive duties in the public interest and emphasizing the necessity for harmonious interplay of functions on the part of both agencies and courts." Thus, in *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission*, 316 U. S. 4, 15, in dealing with a situation closely analogous to the present one this Court sustained the implied and inherent power of reviewing courts to preserve the status quo (even though no private property rights were threatened) in order "to save the public interest from injury or destruction" during the pendency of an appeal. This was stated to be in accord with "the purpose of Congress to utilize the courts as a means for vindicating the public interest. Courts and administrative agencies are not to be regarded as competitors in the task of safeguarding the public interest. *United States* v. *Morgan*, 307 U. S. 183, 190–91; *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134. Courts no less than administrative bodies are agencies of government. Both are instruments for realizing public purposes." And as this Court pointed out in the *Morgan* case, *supra*, at p. 191:

> * * * court and agency are not to be regarded as wholly independent and un-

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[*] Rejecting this conception of the proper relationship between courts and administrative agencies, the majority of the court below viewed the Commission as a creature of limited power which the courts will aid only where and to the extent that Congress has expressly required them so to do.

related instrumentalities of justice, each acting in the performance of its prescribed statutory duty without regard to the appropriate function of the other in securing the plainly indicated objects of the statute. Court and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words should be construed so as to attain that end through co-ordinated action. Neither body should repeat in this day the mistake made by the courts of law when equity was struggling for recognition as an ameliorating system of justice; neither can rightly be regarded by the other as an alien intruder, to be tolerated if must be, but never to be encouraged or aided by the other in the attainment of the common aim.[20]

CONCLUSION

The judgment of the court below should be reversed and the case remanded to that court for remand to the district court with instructions to take jurisdiction of the Commission's complaint and entertain the Commission's motion for a preliminary injunction on the merits. The restraining order of this Court, which continues

[20] This statement was recently quoted in full in *Hecht Company* v. *Bowles*, 321 U. S. 321, 330, as a standard applicable to the exercise of equity jurisdiction in granting equitable relief at the suit of a governmental agency.

only pending the issuance of the mandate, should be extended until further order of the district court in compliance with the mandate.

Respectfully submitted.

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APRIL, 1945.

APPENDIX

The Public Utility Holding Company Act of 1935, c. 687, 49 Stat. 803, 15 U. S. C. § 79 et seq., provides in pertinent part as follows:

SECTION 1 * * *

(c) When abuses of the character above enumerated become persistent and widespread the holding company becomes an agency which, unless regulated, is injurious to investors, consumers, and the general public; and it is hereby declared to be the policy of this title, in accordance with which policy all the provisions of this title shall be interpreted, to meet the problems and eliminate the evils as enumerated in this section, connected with public-utility holding companies which are engaged in interstate commerce or in activities which directly affect or burden interstate commerce; and for the purpose of effectuating such policy to compel the simplification of public-utility holding-company systems and the elimination therefrom of properties detrimental to the proper functioning of such systems, and to provide as soon as practicable for the elimination of public-utility holding companies except as otherwise expressly provided in this title.

DEFINITIONS

SEC. 2. (a) When used in this title, unless the context otherwise requires—

* * * * *

(7) "Holding company" means—

(A) any company which directly or indirectly owns, controls, or holds with power to vote, 10 per centum or more of the outstanding voting securities of a public-

utility company or of a company which is a holding company by virtue of this clause or clause (B), unless the Commission, as hereinafter provided, by order declares such company not to be a holding company; and

(B) any person which the Commission determines, after notice and opportunity for hearing, directly or indirectly to exercise (either alone or pursuant to an arrangement or understanding with one or more other persons) such a controlling influence over the management or policies of any public-utility or holding company as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that such person be subject to the obligations, duties, and liabilities imposed in this title upon holding companies.

The Commission, upon application, shall by order declare that a company is not a holding company under clause (A) if the Commission finds that the applicant (i) does not, either alone or pursuant to an arrangement or understanding with one or more other persons, directly or indirectly control a public-utility or holding company either through one or more intermediary persons or by any means or device whatsoever, (ii) is not an intermediary company through which such control is exercised, and (iii) does not, directly or indirectly, exercise (either alone or pursuant to an arrangement or understanding with one or more other persons) such a controlling influence over the management or policies of any public-utility or holding company as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that the applicant be subject to the obligations, duties, and liabilities imposed in this title upon holding companies. The filing of an application here-

under in good faith by a company other than a registered holding company shall exempt the applicant from any obligation, duty, or liability imposed in this title upon the applicant as a holding company, until the Commission has acted upon such application. Within a reasonable time after the receipt of any application hereunder, the Commission shall enter an order granting, or, after notice and opportunity for hearing, denying or otherwise disposing of, such application. As a condition to the entry of any order granting such application and as a part of any such order, the Commission may require the applicant to apply periodically for a renewal of such order and to do or refrain from doing such acts or things, in respect of exercise of voting rights, control over proxies, designation of officers and directors, existence of interlocking officers, directors and other relationships, and submission of periodic or special reports regarding affiliations or intercorporate relationships of the applicant, as the Commission may find necessary or appropriate to ensure that in the case of the applicant the conditions specified in clauses (i), (ii), and (iii) are satisfied during the period for which such order is effective. The Commission, upon its own motion or upon application of the company affected, shall revoke the order declaring such company not to be a holding company whenever in its judgment any condition specified in clause (i), (ii), or (iii) is not satisfied in the case of such company, or modify the terms of such order whenever in its judgment such modification is necessary to ensure that in the case of such company the conditions specified in clauses (i), (ii), and (iii) are satisfied during the period for which such order is effective. Any action of the Commission under the preceding sentence shall be by order.

SEC. 3. (a) The Commission, by rules and regulations upon its own motion, or by order upon

application, shall exempt any holding company, and every subsidiary company thereof as such, from any provision or provisions of this title, unless and except insofar as it finds the exemption detrimental to the public interest or the interest of investors or consumers, if—

(1) such holding company, and every subsidiary company thereof which is a public-utility company from which such holding company derives, directly or indirectly, any material part of its income, are predominantly intrastate in character and carry on their business substantially in a single State in which such holding company and every such subsidiary company thereof are organized;

(2) such holding company is predominantly a public-utility company whose operations as such do not extend beyond the State in which it is organized and States contiguous thereto;

(3) such holding company is only incidentally a holding company, being primarily engaged or interested in one or more businesses other than the business of a public-utility company and (A) not deriving, directly or indirectly, any material part of its income from any one or more subsidiary companies, the principal business of which is that of a public-utility company, or (B) deriving a material part of its income from any one or more such subsidiary companies, if substantially all the outstanding securities of such companies are owned, directly or indirectly, by such holding company;

(4) such holding company is temporarily a holding company solely by reason of the acquisition of securities for purposes of liquidation or distribution in connection

with a bona fide debt previously contracted or in connection with a bona fide arrangement for the underwriting or distribution of securities; or

(5) such holding company is not, and derives no material part of its income, directly or indirectly, from any one or more subsidiary companies which are, a company or companies the principal business of which within the United States is that of a public-utility company.

* * * * *

(c) Within a reasonable time after the receipt of an application for exemption under subsection (a) or (b), the Commission shall enter an order granting, or, after notice and opportunity for hearing, denying or otherwise disposing of such application. The filing of an application in good faith under subsection (a) by a person other than a registered holding company shall exempt the applicant from any obligation, duty, or liability imposed in this title upon the applicant as a holding company until the Commission has acted upon such application. The filing of an application in good faith under subsection (b) shall exempt the applicant from any obligation, duty, or liability imposed in this title upon the applicant as a subsidiary company until the Commission has acted upon such application. Whenever the Commission, on its own motion, or upon application by the holding company or any subsidiary company thereof exempted by any order issued under subsection (a), or by the subsidiary company exempted by any order issued under subsection (b), finds that the circumstances which gave rise to the issuance of such order no longer exist, the Commission shall by order revoke such order.

SEC. 18 * * *

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(f) Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this title, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper district court of the United States, the Supreme Court of the District of Columbia, or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this title or any rule, regulation, or order thereunder, and upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General, who, in his discretion, may institute the appropriate criminal proceedings under this title.

SEC. 20. (a) The Commission shall have authority from time to time to make, issue, amend, and rescind such rules and regulations and such orders as it may deem necessary or appropriate to carry out the provisions of this title, including rules and regulations defining accounting, technical, and trade terms used in this title.

SEC. 25. The District Courts of the United States, the Supreme Court of the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction of violations of this title or the rules, regulations, or orders thereunder, and, concurrently with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this title or the rules, regulations, or orders thereunder. Any criminal proceeding may be brought

in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by, or to enjoin any violation of, this title or rules, regulations, or orders thereunder, may be brought in any such district or in the district wherein the defendant is an inhabitant or transacts business, and process in such cases may be served in any district of which the defendant is an inhabitant or transacts business or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 128 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 225 and 347), and section 7, as amended, of the Act entitled "An Act to establish a court of appeals for the District of Columbia", approved February 9, 1893 (D. C. Code, title 18, sec. 26). No costs shall be assessed for or against the Commission in any proceeding under this title brought by or against the Commission in any court.

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